

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Closed Captioning and Video Description)
of Video Programming)
)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
)
Video Programming Availability)

MM Docket No. 95-176

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION
OF
ENCORE MEDIA GROUP LLC

Encore Media Group LLC ("EMG") submits this Reply to the opposition filed in this docket to the Petition for Reconsideration that was submitted by EMG herein on October 16, 1997. Specifically, EMG hereby replies to the "Response of the National Association of the Deaf and Consumer Action Network to Requests for Reconsideration" ("NAD Response").

In its Petition for Reconsideration, EMG requested the Commission to reconsider two discrete aspects of the new captioning rules. These aspects upon which EMG seeks reconsideration are as follows:

- (1) With respect to new programming first exhibited after January 1, 1998, EMG requests that the Commission reconsider its conclusion not to create an exemption from the captioning requirements for children's educational programming.

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- (2) With respect to older programming, EMG submits that the Commission should have created an exception for programming first exhibited prior to January 1, 1970.

NAD's Response opposes both of EMG's requests. With respect to the request for an exemption for children's educational programming, NAD mischaracterizes EMG's request as representing an effort "to exclude deaf and hard of hearing children from enjoying the benefits of its programming." NAD Response, p. 4. Similarly, NAD suggests that the proposed exemption for older programming first exhibited prior to 1970 would continue the historical exclusion of deaf and hard of hearing persons from exposure to programming created in an era when virtually nothing was captioned. As shown below, in both cases, NAD has ignored the significant public interest reasons supporting these two requested exemptions.

With respect to instructional educational programming for children, EMG notes that its children's programming channel -- WAM!America's Kidz Network -- is a completely commercial-free youth-oriented educational/entertainment network which devotes a substantial portion of its schedule each day -- approximately half of each day -- to children's educational programming. This programming generally is produced on minimal budgets by institutions, governmentally-supported organizations, and nonprofit producers, and is presented by WAM! as a public service to its subscribers. The cost of captioning such programming in most cases would be prohibitive for the producing institutions, as the cost of closed captioning such programs would often actually exceed the license fees paid by EMG to the producers. EMG could not realistically pay for the closed captioning as that would increase the license fees by more than 100 percent in many cases. Requiring producers or EMG to incur the cost of captioning will directly result in substantially less of such programming being produced and

aired. Therefore, as EMG demonstrated in its Comments and Petition for Reconsideration, such children's educational programming as a class should be exempt from the captioning requirements.

In the *Report and Order*, the Commission determined, at Paragraphs 160-62, to lump this requested exemption into the generalized exemption based on revenues of the programming service which carries such programming, as provided in new Section 79.1(d)(11) of the Rules. EMG has demonstrated, however, that this approach fails to satisfy the discrete and compelling need for an exemption for children's educational programming, and that the failure to create an appropriate exemption will directly result in less educational programming being aired, not only on WAM!, but on all other programming services which air such important, but commercially limited children's educational programming. If the costs of airing instructional programming are essentially doubled by imposition of captioning costs, as was demonstrated in EMG's Petition for Reconsideration, programming networks that air such programming will be discouraged from carrying such public interest programming, choosing instead to carry programming that has more of a commercial base and which therefore would be more likely to have been captioned by its producer. The result will be the loss of substantial amounts of such noncommercial educational programming to *all* Americans; EMG's request for a further exemption is thus an effort to preserve such programming for everyone, not an attempt to *exclude* the hard of hearing. The Commission's approach, however, will result in less children's educational programming being aired.

EMG submits that the focus for increasing the amount of captioning of children's educational programs should not rest with the channels which air them (almost always as a

public service without financial gain as in EMG's case), but rather should be in seeking continued or increased governmental or foundation funding of captioning efforts for these programs. This is an instance where the marketplace unfortunately essentially fails, and where the government or charitable foundations must move in to satisfy a societal need. Merely demanding expensive captioning of such low-revenue programming is short-sighted where such programming is carried completely voluntarily as a public service. Should captioning of educational programming merely be required of programmers, then unquestionably less of such programming will be aired because captioning easily and often costs more than the license fees, if any, that the programmers pay to obtain this programming. For these reasons, the Commission should exempt children's educational programming from the captioning requirements.

EMG also demonstrated in its Petition for Reconsideration that a further exemption for "pre-rule" programming should be adopted to ensure that older films are not lost forever to American culture. Certain programming services that specialize in older films, like certain of EMG's Thematic Multiplex Channels (especially its Westerns, Mystery, and Love Stories Channels), as well as services from other programming providers, such as American Movie Classics (AMC) and Turner Classic Movies (TCM), consist of a substantial proportion of films first exhibited *theatrically* prior to 1970. EMG's concern is that the license fees drop off so dramatically for films first exhibited prior to 1970, that, with only a minimal return possible to the owner on the investment of \$1,000 to \$4,000 or more to caption such films, in most cases the owner will not choose to invest such money to create a captioned version. The result is that once the requirement of captioning 75 percent of pre-rule programming becomes

effective in 2008, a substantial amount of the programming on which classic film channels rely will be essentially unavailable without the networks themselves, which will own none of these films but only a limited exhibition right, being required to undertake that 75 percent captioning obligation.

As EMG has demonstrated, the result of this problem is not limited to a reduction in the number and diversity of programming *services*, but in a real loss to the culture of older, lesser known film titles. Evidence of such a phenomenon is already evident in the video cassette marketplace. Film owners have not automatically reissued all older films on video cassette; rather, only a small fraction of the more famous older titles have been released on video cassette. The cable networks such as EMG's Westerns, AMC, and TCM have been the only remaining home to these less prominent older film titles, and a captioning requirement for such older films will effectively end their lives on these cable networks as well. The result will be a severe cultural loss, not just the loss of a few cable channels and the resultant loss in diversity to viewers.

As with the requested exemption for children's educational programming, EMG's point is not some sinister effort to deprive the hard of hearing of the benefits of its programming, but rather to remove the *disincentive* inherent in the new rules to continue airing this programming for the benefit of all. This potential cultural loss was expressly recognized by Commissioner Chong in her Separate Statement accompanying her vote on the captioning rules.¹ As Commissioner Chong noted as well, this older pre-rule programming is often relied

¹ Commissioner Chong noted that Congress had specifically cautioned that the rules should not be adopted in a manner that would relegate such older programming to the "dusty archives," *citing* H.R. Rep. No. 204, 104th Cong., 1st Sess., at 114 (1995).

upon by new cable networks because such programs are relatively inexpensive and well received by audiences.

Moreover, the impact of this critical failure of the Commission's decision should not be ignored now merely because it does not literally impose its requirements until ten years from now. Rather, the rule's effect will be felt immediately since EMG, as well as other operators of classic film networks such as AMC and TCM, are already engaged in negotiating limited exhibition licenses for films to be aired well beyond the 2008 effective date for the required captioning of pre-rule programming. An exemption for programming first exhibited prior to 1970 will help preserve such films for American culture by preserving the broadest availability of such older programming to classic film networks. Without such an exemption, the range of available programming would be limited to that which the copyright owners thought could earn a sufficient return on the additional captioning investment to make that expenditure. As with creation of home video cassettes of such older films, the copyright owners would most likely pick and choose which films they thought would be worth their investment in captioning.

This requested exemption that would apply primarily to older films is appropriate to promote the airing of the greatest variety and range of such films. If the thousands of films from which EMG now picks and chooses to program its Thematic Multiplex Channels are limited in the next contract cycles to those which the studios choose to expend the money to caption, the tremendous variety of films now aired on those networks will be reduced. Thus, the great bulk of classic films from the 1930s, 40s, and 50s will undoubtedly be relegated to the "dusty archives" just as both the House Report and Commissioner Chong feared.

Conclusion

EMG is actively pursuing the captioning of programming on all eleven of its programming networks, and, for most of EMG's networks, closed captioning of both pre-rule and post-rule programming will proceed far more quickly and more fully than provided in the Commission's new rules. However, there are two limited exemptions that were previously proposed by EMG and which we again ask to be considered by the Commission: (i) children's educational programming; and (ii) programming first exhibited before 1970. Both of these very narrow exemptions will ensure that there will not be a substantial decrease in the amount and quality of these two important categories of programming. In both cases, the costs of captioning would be prohibitive to the networks' ability to continue to provide high quality programming to MVPDs and ultimately to subscribers at consumer-friendly rates. EMG respectfully asks the Commission to reconsider its rules and adopt the limited additional exemptions set forth above.

Respectfully submitted,

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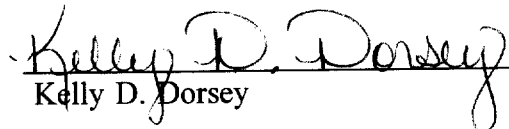
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply to Opposition to
Petition for Reconsideration of Encore Media Group LLC" was served this 11th day of
December, 1997 by first class mail, postage prepaid, upon the following:

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